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Attorney General of the State of California,

Deputy Attorney General of the State of California,
Solicitors for Respondent.

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DEC 30

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1929

No. [redacted] 41

LESLIE T. ALWARD,
Petitioner,

vs.

C. G. JOHNSON, Treasurer of the State of California,
Respondent.

RESPONDENT'S REPLY BRIEF

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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1929

No. 628

LESLIE T. ALWARD,
Petitioner,

vs.

C. G. JOHNSON, Treasurer of the State of California,
Respondent.

RESPONDENT'S REPLY BRIEF

STATEMENT OF THE CASE

Petitioner, as plaintiff in the trial court, sued the Treasurer of the State of California for the sum of $1,057.16, representing a portion of the first installment of taxes paid under protest for the year 1927, pursuant to section 15, article XIII of the state constitution, and section 3664*aa* of the Political Code, providing for a tax on the gross receipts of highway transportation companies, including individuals.

To the plaintiff's third amended complaint a demurrer was sustained without leave to amend and

judgment was entered for the defendant, from which judgment an appeal was taken to the Supreme Court of the state where the judgment of the trial court was affirmed (*Alward* vs. *Johnson*, 208 Cal. 359). Thereafter the case was brought here upon a writ of *certiorari*, the petitioner contending the tax

(1) results in a grossly excessive valuation of his operating properties;

(2) that as applied, it is arbitrary, confiscatory and constitutes the taking of his property without due process of law;

(3) that the constitutional amendment itself by its express terms, applies only to common carriers, and that this petitioner in carrying United States mail is not a common carrier, and

(4) that it is a tax upon an agency of the federal government.

THE FACTS

The tax in question was levied by the state pursuant to the terms of section 15 of article XIII of the constitution of California. By virtue thereof, a person or company owning, operating or managing any automobile, truck, or auto truck, jitney bus, stage or auto stage used in the business of transportation of persons or property as a common carrier for compensation over any public highway in this state between fixed termini or over a regular route, other than buses used exclusively for the transportation of pupils to or from any public school when owned or operated by the school or school district, is required

to pay to the state a tax upon his or its operative property. That tax is in lieu of all other taxes and licenses, state, county and municipal, upon that property, and the amount of the tax is computed by applying a rate or percentage to the gross receipts from operation.

The rate or percentage applicable to a person or company engaged in the business of transporting property is 5 per cent; and the rate or percentage is 4¼ per cent in the case of a person or company engaged in the business of transporting persons, or persons and baggage, or persons and express.

Appellant does not claim that he is not a person within the contemplation of section 15 of article XIII. In his complaint it is alleged that he was, during the period in question, engaged in the business of operating an automotive stage line between fixed termini in this state bearing persons and property for compensation. The tax in dispute is the first installment of the state tax under section 15 of article XIII levied as of the first Monday in March, 1927, and measured by appellant's gross receipts from operation during the calendar year 1926. In that calendar year appellant's gross revenue from the carriage of passengers was $8,803.31; his gross revenue from the carriage of freight was $9,806.43; and his gross revenue from the carriage of United States mail and parcels post was $42,286.73.

It is then alleged (Tr., p. 2) that the State Board of Equalization levied a tax in the sum of $2,114.13

"on the gross income derived from United States mail"; that appellant paid one-half of that sum to the state under protest; and that this action is to recover the amount so paid.

Appellant then alleges that the actual market value of the operative property producing all of the aforesaid revenue did not exceed the sum of $15,000 (Tr., p. 3); that the operative property of appellant has no value in excess of the said actual market value; that the revenue other than that derived from the carriage of United States mail and parcels post is not sufficient to pay appellant's operating expenses; that the assessment made by the State Board of Equalization is confiscatory, arbitrary and excessive; that the tax rate on property generally, taxed on the *ad valorem* basis in the county in which appellant's operative property was situated, did not exceed 3 per cent per $100; that the said operative property of appellant was valued under the *ad valorem* system in an amount the tax on which never exceeded $350; and that appellant's operative property would have to be valued at $99,462.72 in order to justify the amount of the tax levied under section 15 of article XIII.

Finally, appellant alleges that in carrying the United States mail and parcels post he was acting under a contract with the United States government and for that purpose was an agency thereof; that the income derived from that source is not subject to a tax by the state; and that the tax to the extent that

it is based upon the revenue derived by appellant from that source is illegal.

The ground of respondent's demurrer to appellant's third amended complaint is that the latter does not state facts sufficient to constitute a cause of action against respondent or against the State of California.

ARGUMENT

Petitioner's argument may fairly be summarized in two main contentions:

(1) That the tax in its practical operation is contrary to the fourteenth amendment to the federal constitution in that it is excessive.

(2) That the tax is on a federal agency and therefore is violative of section 8, article I, of the federal constitution.

To these contentions the respondent replies as follows:

The Tax Is Not Violative of the Fourteenth Amendment.

The tax in question is a tax upon property. It is not a license tax or a tax for the privilege of engaging in the business of transporting persons and property for hire over the public highways.

The tax in question is similar to the state tax upon the operative property of a railroad company, for instance, which is taxed by the same gross receipts from operation method under section 14, article XIII of the state constitution. It is evident from a comparison of the language of sections 14 and 15

of article XIII that the former was used as a model in the preparation of the latter. For the convenience of the court section 15 is herewith quoted in full:

"Taxes levied, assessed and collected as hereinafter provided upon companies owning, operating or managing any automobile, truck or auto truck, jitney bus, state or auto stage used in the business of transportation of persons or property as a common carrier for compensation over any public highway in this state between fixed termini or over a regular route, other than busses used exclusively for the transportation of pupils to or from any public school, when owned or operated by the school or school district, shall be entirely and exclusively for highway purposes, and shall be levied, assessed and collected in the manner hereinafter provided. The word 'companies' as used in this section, shall include persons, partnerships, joint stock associations, companies and corporations.

(a) All such companies engaged in the business of transportation of persons, or persons and baggage, or persons and express, or persons, baggage and express where the same is transported on the same automobile, jitney bus, stage or auto stage transporting said persons shall annually pay to the state a tax upon their franchises, cars, equipment, and other property, or any part thereof, used exclusively in the operation of their business in this state, equal to four and one-quarter per cent of the gross receipts from operations of such companies and each thereof, within this state.

All such companies operating trucks or auto trucks engaged in the business of transporting property shall annually pay to the state a tax upon their franchises, trucks or auto trucks, equipment, and other property, or any part thereof, used exclusively in the operation of their business in this state, equal to 5 per cent of the gross receipts from operations of such companies, and each thereof, within this state.

When such companies are operating partly within and partly without this state, the gross receipts within this state shall be deemed to be all receipts on business beginning and ending within this state, and a proportion, based upon the proportion of the mileage within this state to the entire mileage over which such business is done, of receipts on all business passing through, into, or out of this state.

Such taxes shall be in lieu of all other taxes and licenses, state, county and municipal, upon the property above enumerated of such companies; provided, that nothing herein shall be construed to release any such company from the payment of any amount to be paid or required by law to be paid for any special privilege or franchise heretofore granted by any of the municipal authorities of this state.

The revenues from the taxes provided for in this section shall be deposited in the general fund and shall be applied and the same are hereby appropriated one-half to the State of California to be devoted exclusively to the maintenance and repair of public highways within this state; the remaining one-half shall be apportioned among

the respective counties of this state, in the proportion that the number of motor vehicles registered within such county for the preceding calendar year bears to the total number of motor vehicles registered in the State of California under the Motor Vehicle Act of such state for the preceding year, and such sums so paid to said counties shall be devoted exclusively to the maintenance and repair of public highways within such county. In the event that all other state revenues are at any time deemed insufficient to meet the annual expenditures of the state, there may be levied in the manner to be provided by law, a tax, for state purposes, on all the property in the state, including the classes of property enumerated in this section, sufficient to meet the deficiency. All property enumerated in this section shall be subject to taxation, in the manner provided by law, to pay the principal and interest of any bonded indebtedness created and outstanding by any city, city and county, county, town, township, or district on the first day of October, one thousand nine hundred and twenty-five. The taxes so paid for principal and interest on such bonded indebtedness shall be deducted from the total amount paid in taxes hereunder.

(b) All the provisions of this section shall be self-executing, and the legislature shall pass all laws necessary to carry this section into effect, and shall provide for the valuation and assessment of the property enumerated in this section, and shall describe the duties of the State Board of Equalization and any other officers in connection with the administration thereof.

The rates of taxation fixed in this section shall remain in force until changed by the legislature, two-thirds of all the members elected to each of the two houses voting in favor thereof. The taxes herein provided for shall become a lien on the first Monday in March of each year after the adoption of this section and shall become due and payable on the first Monday in July thereafter. The gross receipts herein mentioned shall be computed for the year ending the thirty-first day of December prior to the levy of such taxes and the value of any property mentioned herein shall be fixed as of the first Monday in March. Nothing herein contained shall affect any tax levied or assessed prior to the adoption of this section.

(c) No injunction shall ever issue in any suit, action or proceeding in any court against this state or against any officer thereof to prevent or enjoin the collection of any tax levied under the provisions of this section; but after payment action may be maintained to recover any tax illegally collected in such a manner and at such time as may now or hereafter be provided by law."

Prior to the adoption of section 15 of article XIII of the state constitution the State Supreme Court had frequently passed upon the provisions of section 14 of article XIII imposing state taxes on public utilties, measured by their gross receipts from operation, and such taxes had frequently been upheld as constituting property taxes upon the operative property of such companies.

In the case of

San Francisco vs. *Pacific T. & T. Co.*, 166 Cal. 244,

that portion of section 14 providing for state taxes upon the operative property of telegraph and telephone companies was upheld.

In

Pacific Gas & Electric Co. vs. *Roberts*, 168 Cal. 420, 176 Cal. 183,

that portion of the provision taxing the operative property of companies engaged in the transmission or sale of gas or electricity was upheld as a property tax.

In the following cases that portion of the constitutional provision taxing the operative property of railroad companies was upheld:

San Diego, etc., Ry. Co. vs. *State Board of Equalization*, 165 Cal. 560.

Lake Tahoe Ry. and Transportation Co. vs. *Roberts*, 168 Cal. 551.

County of San Bernardino vs. *State Board of Equalization*, 172 Cal. 76.

Southern Pacific Co. vs. *Levee District No. 1*, 172 Cal. 354.

Southern Pacific Co. vs. *Richardson*, 181 Cal. 280.

Pullman Co. vs. *Richardson and Walker D. Hines* vs. *Richardson*, 185 Cal. 484, 261 U. S. 330.

That portion of the constitutional provision taxing

the property of insurance companies for state purposes was upheld as a property tax in the cases of

Hartford Fire Ins. Co. vs. *Jordan,* 168 Cal. 270.
Hughes vs. *City of Los Angeles,* 168 Cal. 764.

That portion of the constitutional provision dealing with the taxation of corporate franchises, interpreted to mean "corporate excess," was upheld as a property tax in

Miller & Lux vs. *Richardson,* 182 Cal. 115.
People vs. *Alaska Pacific S. S. Co.,* 182 Cal. 202.
Pacific Coast S. S. Co. vs. *Richardson,* 186 Cal. 70.
Utah Construction Co. vs. *Richardson,* 187 Cal. 649.
People vs. *Ford Motor Co.,* 188 Cal. 8.
Schwab vs. *Richardson,* 188 Cal. 27.

The amendment to article XIII of the state constitution in 1910 was the first departure from the old and long established system of taxing property in proportion to its value. Section 14, which was added to article XIII by that amendment, provides for state taxes upon property which are not based strictly or directly upon the value of property as "value" is known under the *ad valorem* system. The plan of section 14, as stated by this court in

Bank of California vs. *Roberts,* 173 Cal. 398 (404).

is in various respects inconsistent with the idea that the property therein described shall be assessed in

proportion to its value. It is said that the taxes levied, while described as taxes upon the property, are not based upon any mode of ascertaining either the proportionate or the absolute value of such property. Further, it is said that it was not believed when section 14 was adopted that the method of taxation therein provided for should be limited or controlled by any general provision such as that theretofore contained in section 1 of article XIII requiring taxation in proportion to value.

This point seems to require emphasis, for in his complaint, as well as in his brief, the appellant refers to the tax in question as a tax "on gross receipts" and particularly "on the gross income derived from United States mail." This misconception of the nature of the tax levied under section 15 of article XIII sweeps away appellant's contention that the tax is violative of the fourteenth amendment.

It is not claimed by appellant that the tax was levied against property of the appellant located outside of the taxing jurisdiction of the state, therefore the due process of law clause in the fourteenth amendment has not been offended. It is not claimed by appellant that the tax is discriminatory or that the classification set up by section 15 of article XIII is improper; hence the tax does not contravene the equal protection of the law clause in the fourteenth amendment. Appellant was not engaged in interstate business and no interstate receipts are involved; hence the record in this case does not require that any

attention be given to the commerce clause in the federal constitution about which centered the entire controversy in the case of *Pullman Co.* vs. *Richardson*, 185 Cal. 484, 261 U. S. 330, upon which appellant so heavily relies.

Appellant's third amended complaint is evidently framed on the theory that there is no legal justification for a tax levied under section 15 of article XIII unless the amount thereof fairly approximates the amount of an ordinary tax upon property, but that theory pertains only to a case wherein a state undertakes to tax by the gross receipts from operation method a person or company engaged in interstate business as well as intrastate business. The fact that Pullman Company was doing an interstate business was the only reason for litigation instituted by that company against the state and the only reason for the discussion by this court of said theory. That was the only reason for the declaration by this court at the conclusion of its opinion in the *Pullman* case that

> "it will be unnecessary to consider or determine the extent to which the taxing power of the state may be exercised in the event that the burden upon the property of interstate commerce carriers is out of all reasonable proportion to that imposed upon the property of others within the state."

Even in the so-called King tax bill cases, 294 Fed. 742, filed against the State of California by Southern Pacific Company and by Atchison, Topeka and Santa

Fe Railway Company, which involved the commerce clause in the Federal Constitution, it was held by the United States District Court, Judge Dietrich presiding, that there is no requirement of comparative equality between the state tax burden upon the property of a railroad company and the average tax burden upon common property. The court held that there was no practical way of making the comparison there insisted upon by the carriers.

> *Atchison, Topeka and Santa Fe Railway* vs. *Collins and Southern Pacific Company* vs. *Collins*, 294 Fed. 742.

In the King tax bill cases an appeal was taken by each company to the United States Supreme Court and each appeal was thereafter dismissed at the request of the company.

That it would be impracticable and unnecessary to make the comparison of tax burden insisted upon by the railroad companies in the King tax bill cases is also pointed out in the cases of

> *State* vs. *Wells Fargo and Co.*, 179 N. W. 221.
> *State* vs. *Pullman Co.*, 179 N. W. 224.

What has already been said completely disposes of the entire line of cases cited by appellant, headed by the *Pullman* case, which center upon the commerce clause.

To repeat, appellant does not assert that section 15 of article XIII discriminates contrary to the fourteenth amendment, but there is no room for that

contention. That very point was raised in an injunction proceeding entitled

Bekins Van Lines et al. vs. *Ray L. Riley, as State Controller,* No. 2199-S,

filed in the District Court of the United States in and for the Southern Division of the Northern District of California, and a three-judge court sitting under section 266 of the Judicial Code, consisting of Federal Judges Hunt, Kerrigan and St. Sure, upheld the section against that attack, and dismissed the bill of complaint. Upon appeal to this court the judgment of the United States District Court was affirmed.

Bekins Van Lines et al. vs. *Riley,* 280 U. S. 80.

In its opinion affirming the judgment of the lower court this court said:

> "By this proceeding, instituted July 21, 1928, appellants ask that the constitutional amendment and the statute which undertake to lay such tax upon them be declared discriminatory and in conflict with section 1 of the fourteenth amendment; also, that an injunction issue against the State Controller forbidding him from attempting to enforce payment.
>
> Upon motion, without written opinion, the District Court—three judges sitting—dismissed the bill. The cause is here by direct appeal; and the only matter for our determination is the validity of the challenged classification.
>
> The power of a state in respect of classification has often been declared by opinions here. We

are unable to say that there was no reasonable basis for the one under consideration; the court below reached the proper result; and its decree must be affirmed.

Appellants voluntarily assumed the position of common carriers operating between fixed termini and enjoy all consequent benefits. That a marked distinction exists between common and private carriers by auto vehicles appears from *Frost* vs. *Railroad Commission,* 271 U. S. 583 and *Michigan Public Utilities Commission* vs. *Duke,* 266 U. S. 570. Sufficient reasons for placing common carriers, operating as appellants do, in a special class are pointed out by *Raymond* vs. *Holm,* 165 Minn. 215; *State* vs. *Le Febvre,* 174 Minn. 248; *Iowa Motor Vehicle Assn.* vs. *Board of Railroad Commissioners,* 207 Iowa 461; *Liberty Highway Co.* vs. *Michigan Public Utilities Commission,* 294 Fed. 703. Their use of the highways probably will be regular and frequent and, therefore, unusually destructive thereto. Also, it will expose the public to dangers exceeding those consequent upon the occasional movements of other carriers.

Although relied upon by counsel and said to be almost identical with the case at bar, *Quaker City Cab Co.* vs. *Pennsylvania,* 277 U. S. 389, gives no support to claim of undue discrimination. We regard the controversy as not open to serious doubt and further discussion of it seems unnecessary."

See, also,

Bacon Service Corp. vs. *Huss,* 199 Cal. 21, 275 U. S. 507.

In re Schmolke, 199 Cal. 42, 273 U. S. 646.

In the opinion of the State Supreme Court in the case at bar it was said:

"Appellant attempts to raise questions concerning the method of taxation adopted by the people of the state in 1910, by which the system of state and local taxation was separated, which were long ago settled against his contentions. He first asserts that the actual market value of the various units of property used in the operation of his stage line is not more than $15,000, and that prior to the adoption of section 15, *supra,* the ad valorem tax on his property never exceeded $350 per annum. He therefore claims that, as applied to his property, the prescribed method of taxation results in an arbitrary, excessive and confiscatory tax, violative of the fourteenth amendment to the federal constitution. He further contends that, inasmuch as the tax is not based upon the true valuation of his property, it ceases to be a tax on property and becomes a direct levy upon appellant's contract to carry mails for the United States government, and is, therefore, a tax on a federal agency. The question as to whether or not the taxes levied for state purposes by section 14 of article XIII, upon the gross receipts of the utilities there enumerated, are taxes upon property has several times been considered by this court, and in each instance it has been declared to be essentially a property tax. (*Pullman* vs. *Richardson,* 185 Cal. 484, 487 (197 Pac. 346), affirmed in 261 U. S. 330, 339 (67 L. Ed. 682, 43 Sup. Ct. Rep. 366, 368), and cases there cited).

(1) The tax required by section 15 of article XIII of the constitution on the gross receipts of appellant's business is the identical kind of a tax required by section 14, and is, like the other, essentially a property tax. It is neither arbitrary, excessive or confiscatory to the extent of rendering it violative of the due process clause of the fourteenth amendment to the federal constitution."

There is a wealth of adjudication establishing the constitutionality of a classification such as that found in section 15 of article XIII of the California constitution.

Bacon Service Corp. vs. *Huss*, 199 Cal. 21, 48 Sup. Ct. 158; 275 U. S. 507.

In re Schmolke, 199 Cal. 42, D. 47 Sup. Ct. 244, 273 U. S. 646.

Matter of Schuler, 167 Cal. 282.

Matter of Stork, 167 Cal. 294.

Northwest Auto Co. vs. *Hulbert*, 207 Pac. 161.

Raymond vs. *Holm*, 206 N. W. 166.

State vs. *Peterson*, 198 N. W. 1011.

Atlantic Coast Line R. Co. vs. *Doughton*, 43 Sup. Ct. 620, 624.

Quaker City Cab Co. vs. *Pa.*, 48 Sup. Ct. 553.

Louisville Gas & Electric Co. vs. *Coleman*, 48 Sup. Ct. 423.

Oliver Iron Mining Co. vs. *Lord*, 43 Sup. Ct. 525, 529.

Pacific Express Co. vs. *Seibert*, 142 U. S. 339, 351.

Magoun vs. *Illinois Trust & Savings Bank*, 170 U. S. 283 (293–297).

Ky. Railroad Tax Cases, 155 U. S. 321, 337.

There is no claim by appellant that the tax in question clearly results in such flagrant and palpable inequality between the burden imposed and the benefit received as to amount to the arbitrary taking of property without compensation, in other words, "to spoliation under the guise of exerting the power of taxing."

Dane vs. *Jackson*, 256 U. S. 589, 599.

In appellant's third amended complaint it is alleged that the assessment made by the state board is "confiscatory, arbitrary and excessive" and does not take into consideration the actual value of appellant's operative property. However, as already observed, the tax under section 15, like the tax under section 14 of article XIII, is not strictly a tax on property according to its value, and furthermore the mere allegation that the assessment is confiscatory, arbitrary and excessive does not charge that which constitutes spoliation, against which the fourteenth amendment protects. Appellant has not cited a single case in support of his statement that the tax contravenes the fourteenth amendment. The Supreme Court of the State of California has held that a complaint which merely alleges that an assessment is excessive and arbitrary and fails to allege actual or constructive fraud or mistake does not plead a cause of action.

Miller & Lux vs. *Richardson*, 182 Cal. 115, 128.

It has been held by the Supreme Court of the United States that a state tax does not violate the fourteenth amendment merely because it is excessive in amount. An encroachment on private rights so clear and palpable as to leave no doubt that the attempted taxation by its necessary operation is really spoliation under the guise of exercising the power to tax must be pleaded and proved before relief can be had under the fourteenth amendment.

The Michigan Telephone Tax Cases, 185 Fed. 634, 229 U. S. 322, 335.

This court has also held that a law imposing a tax is not repugnant to the constitution as being confiscatory because in an isolated case it may impose a hardship; and in the same case it is held that a tax on railway property measured by gross earnings is not confiscatory because the earnings of the railroad may not be sufficient to pay operating expenses.

Ohio Tax Cases, 232 U. S. 576, 203 Fed. 537.

It is fundamental that the power of taxation of each of the states over all persons and property within its jurisdiction is an inherent and not a delegated power and knows no limits except those imposed expressly or by plain implication in the federal constitution.

Vol. 26 R. C. L. Par. 63.

McCulloch vs. *Maryland*, 4 Wheat. 315.

State Tax on Foreign Held Bonds, 15 Wall. 300:

"The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the state. These subjects are persons, property, and business. Whatever form taxation may assume, whether as duties, imposts, excise, or licenses, it must relate to one of these subjects. It is not possible to conceive of any other, though as applied to them, the taxation may be exercised in a great variety of ways. It may touch property in every shape, in its natural condition, in its manufactured form, and in its various transmutations. And the amount of the taxation may be determined by the value of the property, or its use, or its capacity, or its productiveness. It may touch business in the almost infinite forms in which it is conducted, in professions, in commerce, in manufactures, and in transportation. Unless restrained by provisions of the federal constitution, the power of the state as to the mode, form, and extent of taxation is unlimited, where the subjects to which it applies are within her jurisdiction."

Bells Gap Rd. Co. vs. *Pa.*, 134 U. S. 232:

"We think that we are safe in saying, that the fourteenth amendment was not intended to compel the state to adopt an iron rule of equal taxation."

Henderson Bridge Co. vs. *Henderson*, 173 U. S. 592.

Wagner vs. *Baltimore*, 239 U. S. 207.

The Tax Is Not on a Federal Agency.

The tax imposed by section 15 is a tax upon all property used by the appellant in the said business. The amount of the tax is measured by percentages of the gross revenue from the transportation of persons and property. No provision is made in the section for the exclusion from the gross receipts base of the amount of revenue derived by a common carrier under a contract with the federal government for the transportation of mail and parcels post. The situation is precisely the same as that presented in the King tax bill cases where it was alleged and proved by Southern Pacific Company that it owned and operated under several federal franchises or grants of special privilege from the federal government.

The tax on a railroad company under section 14 of article XIII falls upon all property of every kind used by the company in its railroad business and necessarily includes intangibles, as well as tangibles, which in turn comprehend contract rights, whether called franchises or otherwise termed. The Southern Pacific Company contended that the state tax in its practical operation fell directly upon its federal franchises, and that the tax was therefore void for the reason first declared in *McCulloch* vs. *Maryland*. The United States District Court held that the contention was unsound,

> *Southern Pacific Company* vs. *Collins*, 294 Fed. 742, 744.

citing

Chicago, etc., Co. vs. *Babcock*, 204 U. S. 585, 597.

Western Union Tel. Co. vs. *Caggart*, 163 U. S. 1.

Central Pacific R. R. Co. vs. *California*, 162 U. S. 91.

Since it is legal to include in the gross receipts tax base revenue derived by a railroad company from the exercise of federal franchises in conjunction with the use of its other operative property, it would seem to follow that it is legal to include in the gross receipts tax base of a common carrier over the public highways revenue derived by it from the performance of service under a contract with the federal government.

The contract between the appellant and the federal government is not taxed by section 15 of article XIII. That section imposes a tax upon property—property which is used in a particular way, to wit, in the transportation of property and persons for hire over the public highways between fixed termini or over a regular route. It might have been sound policy for the people in framing that section to have excluded from the gross receipts base revenue derived from carrying mails under a government contract such as was made, for instance, in chapter 412, Statutes of 1925, section 9½, which statute was the subject of controversy in the case of

In re Schmolke, supra.

Of course it is recognized that a state may not

burden or interfere with the exertion of national power or make it a source of revenue or take the funds raised or tax the means used for the performance of federal functions.

Panhandle Oil Co. vs. *Miss.*, 48 Sup. Ct. 451.

But the doctrine of immunity of a federal agency from state taxation does not extend beyond the reason which underlies it.

> "It can not be that a state tax which remotely affects the efficient exercise of a federal power is for that reason alone inhibited by the constitution. To hold that would be to deny to the states all power to tax persons or property. Every tax levied by a state withdraws from the reach of federal taxation a portion of the property from which it is taken, and to that extent diminishes the subject-upon which federal taxes may be laid. The states are, and they must ever be, coexistent with the national government. Neither may destroy the other. Hence the federal constitution must receive a practical construction. Its limitations and its implied prohibitions must not be extended so far as to destroy the necessary powers of the states, or prevent their efficient exercise."

Union Pacific Railroad Co. vs. *Peniston*, 18 Wall. 5, 30.

In its opinion upon this branch of the case the State Supreme Court in the case at bar said:

> "(2) The second main contention of appellant is that he carries the United States mails and

parcels post under a contract with the Postoffice Department of the United States Government, and for that purpose is an agency of the government and, as such, immune from state taxation. He cites cases in which the courts have denied the state the right to collect taxes upon transactions in which the federal government is directly engaged (e. g., *Panhandle Oil Co.* vs. *Mississippi*, 277 U. S. 218 (56 A. L. R. 583, 72 L. Ed. 857, 48 Sup. Ct. Rep. 451)). But there is a very material difference between such transactions and one in which a private citizen, whose only relation to the government is that of contract, is under obligation to furnish service in accordance with that contract. 'Mere contracts between private corporations and the United States do not necessarily render the former essential government agencies and confer freedom from state control.' (*Metcalf and Eddy* vs. *Mitchell*, 269 U. S. 514 (70 L. Ed. 384, 46 Sup. Ct. Rep. 172, 174, 175).) In that case, involving a tax on the income of consulting engineers in state service, the court, speaking through Mr. Justice Stone, said: '------ not every person who uses his property or derives a profit, in his dealings with the government, may clothe himself with immunity from taxation on the theory that either he or his property is an instrumentality of government within the meaning of the rule. (Citing cases.) * * *

'It seems to us extravagant to say that an independent private corporation for gain created by a state is exempt from state taxation either in its corporate person, or its property, because it is employed by the United States, even if the work

for which it is employed is important and takes much of its time.'

In Union Pac. R. R. Co. vs. *Peniston,* 18 Wall. (85 U. S. 5) 33 (21 L. Ed. 787, see, also, Rose's U. S. Notes), it was claimed that the state of Nebraska had illegally imposed a tax upon the property of the railroad company, the contention being that the property was exempt from state taxation by virtue of the incorporation of the company by the United States as a means for the performance of certain public duties of the government, enjoined and authorized by the constitution. In considering the contention, the court said: 'It may, therefore, be considered as settled that no constitutional implications prohibit a state tax upon the property of an agent of the government merely because it is the property of such an agent. A contrary doctrine would greatly embarrass the states in the collection of their necessary revenue without any corresponding advantage to the United States. A very large proportion of the property within the states is employed in execution of the powers of the government. It belongs to governmental agents, and it is not only used, but it is necessary for their agencies. United States mails, troops, and munitions of war are carried upon almost every railroad. Telegraph lines are employed in the national service.

* * * * *

They are the property of natural persons, or of corporations, who are instruments or agents of the general government, and they are the hands by which the objects of the government are attained. Were they exempt from liability to

contribute to the revenue of the states it is manifest the state governments would be paralyzed.' "

Petitioner relies upon the case of

Panhandle Oil Co. vs. *Miss.*, 277 U. S. 218,

where an attempt was made by the state to collect from a distributor of motor vehicle fuel the tax of one cent on each gallon of fuel sold by the distributor to the federal government for the use of its coast guard and the Veterans' Hospital. In that case it was held that the necessary operation of the statute was directly to retard, impede and burden the exertion by the United States of its constitutional powers to operate the coast guard fleet and the Veterans' Hospital.

Here, as we have already noted, we are concerned not with a privilege or excise tax, such as was involved in the Mississippi case, but with a tax on property; the tax is not on the contract between petitioner and the federal government but upon the property used in conducting the kind of business specified in section 15 of article XIII of the constitution; and any interference that there may be with the functioning of the federal government is extremely indirect and too remote fairly to be regarded as that kind of interference against which the federal government is protected by the federal constitution.

Metcalf & Eddy vs. *Mitchell*, 269 U. S. 514.

In considering whether section 15 of article XIII interferes with the discharge of a function of the

federal government it would seem that consideration should be given not only to the fact that the tax thereby imposed is a tax upon property devoted to a peculiar use, but also to the fact that the tax is upon property which is being used for compensation over the public highways and to the fact that the revenues derived from that tax are appropriated one-half to the state for maintenance of public highways and one-half to the counties for the maintenance of public highways. In this connection consideration should also be given to the fact that under the terms of the Federal Highway Act (39 Stat., p. 355) federal moneys are made available to the states for the purpose of constructing public highways, and of course, one of the primary purposes of that appropriation is to enable the federal government to better perform its duty, under section 8, article I of the federal constitution, of establishing post offices and post roads.

The tax here in question, as we have already said, is not an excise or license tax, but a tax upon property used in a particular manner, and it is merely an incident that the property happens to be used in this instance in the carrying of government mail.

This court has long recognized the distinction between taxing income and using income as the measure of a tax upon property.

Flint vs. *Stone Tracy Co.*, 220 U. S. 107.
Macallen Co. vs. *Massachusetts*, 279 U. S. 620.

The case of *New Jersey Bell Telephone Co.* vs. *State Board*, 280 U. S. 338, upon which appellant

relies here, is readily distinguished. In that case the tax in question was not a lien tax on all property of the company or in fact of any property but only in lieu of other franchise taxes. This court held that the tax was not a tax on property nor in substitution for or in lieu of a property tax, but that it was a direct tax on gross receipts derived from the telephone company's *interstate commerce* and as to that part, at least, it was void.

The tax here in question is, by the State Constitution, "in lieu of all other taxes and licenses, state, county and municipal, upon the property above enumerated of such companies."

Nor is the tax exorbitant, as appellant claims, merely because it is out of proportion to that imposed upon the property of others within the state.

Pullman Co. vs. *Richardson, supra.*
Southern Pacific Co. vs. *Collins*, 294 Fed. 742.
Bekins Van Lines vs. *Riley*, 280 U. S. 80.

As this court remarked in the case last cited above, the use of highways by common carriers probably will be regular and frequent and, therefore, unusually destructive thereto, as well as exposing the public to dangers exceeding those consequent upon the occasional movements of other carriers.

Appellant's operations over the public highways of the state are destructive of such highways in proportion to the revenues received by him from such operations. Ordinary property, such as real estate

and the improvements thereon, do not destroy public property or make necessary its constant upkeep and repair as is requisite in the case of public highways maintained by the state.

Appellant states in his supplemental brief (p. 4) that he is not objecting to the method of taxation but rather to the manner in which it is applied to him. If the method is not subject to objection then the fact that the manner of its application to appellant seems to impose a hardship upon him is an insufficient basis for declaring the law to be invalid.

The Michigan Telephone Tax Cases, 229 U. S. 322.

Ohio Tax Cases, 232 U. S. 576.

Miller & Lux vs. *Richardson*, 182 Cal. 115.

Bells Gap Rd. Co. vs. *Pennsylvania*, 134 U. S. 232.

Henderson Bridge Co. vs. *Henderson*, 173 U. S. 592.

Alcaraz vs. *Johnson*, 208 Cal. 359.

We think we are justified in saying that it is demonstrated herein that the tax here in question (a) is a tax on property used in a particular way, and that it is not a tax on income; (b) that it is not a tax on a government contract nor upon an agency employed by the federal government in the exercise of its constitutional powers.

Appellant having failed to show that the tax complained of violates any provision of the federal or

state constitution, it is submitted that the judgment of the Supreme Court of the state should be affirmed.

Respectfully submitted.

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